Section 4 states that it is the sense of Congress that this act is consistent with and in accord with the General Agreement on Tarriffs and Trade (GATT).

I ask unanimous consent that the text of the bill to be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2167

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That this Act may be cited as the "Unfair Foreign Competition Act of 1982."

SEC. 2. Section 1 of the Clayton Act (15 U.S.C. 12) is amended by inserting after the words "nineteen hundred and thirteen;" the words "section 801 of the Act of September 8, 1916, entitled 'An Act to raise revenue, and for other purposes' (39 Stat. 798; 15 U.S.C. 72);".

SEC. 3. Section 801 of the Act of September 8, 1916, entitled "An Act to raise revenue, and for other purposes" (15 U.S.C. 72) is amended to read as follows:

"(a) It shall be unlawful for any person to import, assist in importing, or sell, or cause another to import, assist in importing, or sell within the United States any article manufactured in a foreign country at a purchase price less than the foreign market value (or, in the absence of any such value, the constructed value) prevailing at the time, if the reasonably foreseeable effect of such importation or sale of such article is—

"(1) material injury to industry or labor engaged in commerce in the United States; and,

"(2) the prevention, in whole or in part, of the establishment, modernization or expansion of industry in the United States.

"(b) Any person who knowingly violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, upon conviction thereof, shall be liable to imprisonment for a term not to exceed one year, or a fine not to exceed $1,000,000, or both.

"(c)(1) Any person who has been injured in his business or property by reason of any violation of, or conspiracy to violate this section, may sue in the district court of the United States for the district in which the defendant resides, transacts business, is found or has an agent, without respect to the amount in controversy.

"(2) In the case of any suit filed under paragraph (1), the court shall have jurisdiction to decide such suit and may issue a temporary or permanent injunction or a temporary restraining order prohibiting the importation or sale of any articles which have been or will be imported or in violation of subsection (a) of this section.

"(3) Any plaintiff prevailing in a suit filed under paragraph (1) of this subsection shall, upon a finding of injury under subsection (a), recover threefold the damages sustained, any other equitable relief as may be appropriate, and the cost of the suit, including reasonable attorney fees.

"(d) The standard of proof is any action filed under subsection (c) is a preponderance of the evidence. Upon a prima facie showing that there has been a violation of subsection (a) or upon preliminary or final determination by the International Trade Commission or administering authority that is affirmative under sections 703, 705, 733, or 735 of the Tarriff Act of 1930 (19 U.S.C. 1671b, 1671d, 1673b and 1673d) and which shall be considered a prima facie case for purposes of this section, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown that such articles have not been imported or sold at less than foreign market value, the Court may issue an appropriate order including any penalty or sanction authorized by subsection (e).

"(e) If, during the course of any proceeding under this section, the court determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned be excluded from entry or sale in the United States, pending completion of the suit.

"(f) Whenever it shall appear to the court before which any proceeding under this Act may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served and enforced in any judicial distirct of the United States.

"(g) If a defendant, in any proceeding brought under subsection (c) of this section in any court of the United States, fails to comply with any discovery order, or other order or decree of such court, the court may enjoin the further importation into the United States, sale, or distribution in interstate commerce within the United States, by such defendant of articles which are the same as, or similar to, those articles which are alleged in such proceeding to have been sold or imported in violation of the provisions of subsection (a) of this section, until such time as the defendant complies with such order or decree, or may take any other action authorized by law, including entering judgment for the plaintiff.

"(h) The confidential or privileged status accorded to any documents, comments or information by law shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, may accept depositions, documents or affidavits under seal, and may disclose such material under such terms and conditions as it may order.

"(i) Any suit filed under subsection (c) shall be advanced on the docket and expedited in every way possible.

"(j) For the purpose of construing the term 'foreign market value', the court shall apply the definition of such term contained in the Anti-dumping Act of 1921 (19 U.S.C. 160–173) and the Tariff Act of 1930 (19 U.S.C. 1671 et. seq.). To the extent that any governmental or other subsidy provided to a manufacturer or producer is not included in the foreign market value or constructed value, then the amount of such subsidy shall be added on to the foreign market value or constructed value.

"(k) The acceptance by any foreign manufacturer or exporter of any right or privilege conferred upon him to sell his products or have his products sold by another party in the United States shall be deemed equivalent to an appointment by the foreign manufacturer or exporter of the Commissioner of Customs to be the true and lawful attorney upon whom may be served all lawful process in any action or proceeding relating to the foreign manufacturer or exporter under this section.

"(l) The action brought under subsection (c) shall be barred unless commenced within four years after the cause of action accured.

SEC. 4. It is the sense of the Congress that the provisions of this Act are consistent with and in accord with the General Agreement on Tariffs and Trade (GATT).

AGENT IDENTITIES BILL

Mr. SPECTER. Mr. President, during the debate on the agent identities bill, I did not have an opportunity to present my views during the time allotted. At this time, I should like to present the statement of my position in this matter, which I will amplify when the agent identities bill is before the Senate for further debate next week.

Mr. President, all Senators share a strong desire to protect the identities of U.S. intelligence agents because disclosures harm the intelligence agencies and can harm the agents themselves. All Senators want to enact a law that, consistent with constitutional protections of fairness in criminal justice and of freedom of the press, will effectively deter systematic disclosures and will surely punish the disclosures. Disagreement arises, however, over whether requiring proof of intent to impair U.S. intelligence activities or only reason to believe impairment will occur will better assure conviction of the guilty and protection of professional journalists from the chilling effect of possible prosecution.

Senator CHAFEE, who has long championed the cause of protecting agents' identities, has proposed an amendment to the Intelligence Identities Protection Act of 1981 (S. 391) to remove the requirement of intent which was inserted by the Judiciary Committee. As a member of the Judiciary Committee, I know that the insertion was made to protect the media. Senator CHAFEE, however, believes that the intent standard "substantially weakens the bill." His amendment, like the bill passed last fall by the House of Representatives, would substitute a lower standard of proof derived from the civil law of negligence—"reason to believe."

Its sponsors believe the amendment is necessary to successful prosecution of those "in the business of naming names" and do not believe the amendment would threaten the press. I disagree.

In my opinion, as a former prosecutor, the reason to believe standard is inappropriate, undesirable, and unnecessary. It may also be unconstitutional.

In our system of justice, criminal cases have traditionally required proof of criminal intent. That practice, which has been generally followed in this country for nearly 200 years, has proven to be both realistic and fair. The practice is workable even though we cannot get inside the accused's head to examine his intentions because of two well established legal doctrines. First, the accused is deemed to intend the "natural and probable consequences" of his actions. Second, his intent need not be proved by direct evidence, such as his statements, but may be inferred from his actions. Juries are instructed by the court that specific intent "may be determined

from all the facts and circumstances surrounding the case." Even where the accused proclaims that his intent was innocent, juries often discount such statements and infer the requisite intent. On the basis of considerable personal experience in such cases, I know that the doctrine of inferred intent works and works well.

Requiring intent also furnishes an essential element of the fundamental fairness that characterizes our criminal proceedings. The requirement serves to protect innocent individuals from the hardship of unnecessary trial and the risk of unjust conviction. The lower standard of reason-to-believe, by contrast, imposes legal liability despite innocent intentions whenever the person should have foreseen that harm might result from his actions. In the context of agents' identities, this means that an individual motivated solely by a desire to stop illegal practices who discloses the identity of the offending agent to anyone outside of certain Government agencies could be sent to prison because he should have anticipated that his disclosure would make future recruitments or cooperation of agents more difficult. Indeed, such impairment might well follow from virtually any disclosure, even one for a most laudatory purpose.

Too broad a range of cases would be included by a standard that the actor would have reason to believe that identifying an intelligence agent would cause such impairment. As Senator CHAFEE himself observed in the debate last Thursday, "Any reasonable person would know that by naming names you are going to impair the foreign intelligence activities of the United States." If that is so, then the reason-to-believe standard is no standard at all for it is met automatically and without regard to the purpose or circumstances of the disclosure. Accordingly, the reason-to-believe standard is inappropriate in a felony statute.

If the criminal law should not punish a person with innocent intentions, then the amendment compounds the inherent unfairness because it would apply in a first amendment context. Passage of the Chafee amendment could subject a reporter or broadcaster, as well as the editors and all officers involved in reviewing the story, risk of criminal prosecution. No matter how innocent everyone's intentions, how necessary disclosure of the name was to the credibility or effectiveness of the story or how outrageous or illegal the conduct of the agent, criminal prosecution would be possible.

No doubt, the Justice Department would decline to prosecute such a case. But a violation certainly would have occurred.

Some Senators have argued that reporters in such circumstances are not covered by the bill because of another provision which requires proof that the disclosure was made "in the course of a pattern of activities intended to identify and expose agents." Senator CHAFEE, for example, said in the debate, "It is not one disclosure, it is a pattern of activities." The definition given to "a pattern of activities," however, is several actions with a "common purpose." Such a pattern would be found in the following hypothetical circumstance.

A reporter separately interviews six sources about an unidentified CIA agent allegedly involved, with agency approval, in drug trafficking overseas. In each interview, the reporter seeks clues to the person's identity. He succeeds in piecing together various facts and then writes a story naming only this one agent. Since the six interviews—a reporter's normal and lawful pursuit—all had the common purpose of gathering facts for a story about the agent, they form a pattern of activities and undeniably they were intended to identify and expose this agent. Thus, in fact, the amended bill would not require a series of disclosures over a period of time, but only one disclosure in one story that could result from activities as innocuous as news interviews.

The mere possibility of prosecution in such circumstances might have a very chilling effect on the press. After all, whether or not with good reason, members of the press may be reluctant to rely on the grace of the Justice Department not to prosecute them even though they would have violated the terms of the act. But the discomfort of the press is not where the potential harm ends. Chilled by the act, the press might become less vigorous, less confident and therefore less informative. The public would be the loser.

Precisely to prevent such chilling, the courts closely scrutinize the constitutionality of any such criminal statute. If S. 391 is amended, the courts might well strike it down as unconstitutional. In that event, my colleagues and I might find ourselves engaged in the same debate 5 years hence. We might again be considering S. 391 as reported by the Judiciary Committee because in that form the bill is not subject to serious constitutional challenge. It is the amendment that creates the constitutional infirmity.

A workable bill 5 years from now is too late; our intelligence agents need and deserve such a bill right now. In fact, all parties to the debate agree on the need for immediate action on a bill that will survive legal challenge, that will reach those whose evil deeds led to the bill being proposed, and that will result in successful prosecutions of those trying to impair U.S. intelligence activities. I would hope they would also agree that the bill must do so without impairing freedom of the press.

In view of the risks entailed in the Chafee amendment, what is the overriding need that justifies taking these risks? The administration, the Justice Department and the CIA have consistently indicated a strong preference for the reason to believe standard which they view as more effective. President Reagan recently wrote Senators, stating—

> . . . Attorney General Smith and I firmly believe that the (Chafee version) is far more likely to result in an effective law that could lead to successful prosecution.

In theory, they may be correct, but, with all due respect, I believe in practice the amendment is unlikely to improve the prospects for successful prosecution for these three reasons:

First. Indictments would be less likely because of increased "graymail";

Second. Trials would be longer and more complicated and confusing, putting the CIA, instead of the accused, on trial as to the adequacy of its efforts to protect intelligence indentities; and

Third. Appeals might involve greater delay and risk of reversal.

The amendment is entirely unnecessary since the bill, as reported, will reach all those it needs to reach. Only legitimate journalists would be beyond its reach, but the CIA has always been very clear about its total lack of interest in prosecuting reporters. It is concerned with those persons who publish items like the Covert Action Information Bulletin. In my judgment such persons can be successfully prosecuted under the intent standard since their intent is apparent from the face of their publications. I have met twice with Director Casey and know that he finds the committee version of the bill acceptable.

What if their successors try to mask their intention by proclaiming their purpose to be not impeding, but improving U.S. intelligence activities? In the debate, Senator CHAFEE stated that such protestations would create "a loophole big enough to drive a truck through." Juries, in my experience, are not so easily tricked. Rather, they are skeptical of what the accused says and looks to what he did in assessing intent.

Certainly, no actual case has been cited to which could not be brought or was lost because intent could not be established while reason to believe could. Moreover, I have been advised by former Justice Department officials that in most intelligence disclosure cases what prevents prosecution is not insufficient proof of intent but rather what has become known as graymail. Graymail occurs when the defense is able to compel sufficient revelation of intelligence secrets that the cost of the prosecution is viewed as exceeding the benefits. Consequently, most such investigations are terminated without a prosecution being initiated even though ample proof exists. Sometimes the defense is entitled by law to introduce the sensitive information at trial. More often, however, defense attorneys are merely entitled to receive the information as part of their pretrial preparation, known as discovery.

Unintentionally, the amendment would probably increase the scope of the pretrial discovery that the court would order. For instance, the defense could assert that in view of the apparent absence of harm to those agents whose identities were previously revealed, their client, rather than having reason to believe impairment would follow his disclosure, instead had reason to believe it would not. Thus, the defense would seek to discover all CIA documents on the 2,000 persons previously identified as intelligence agents in order to determine what effect, if any, the public revelation of identity had on their safety and productivity. In response, the CIA would deny the discovery requests even though the prosecution could not then proceed.

The so-called graymail statute enacted by Congress does not solve this problem for it did not—and could not—restrict the scope of discovery. That depends on the elements of the offense charged and the nature of the Government's proof. All the statute did was prevent surprise use of classified information at trail and expressly authorize the trial judge to admit into evidence documents from which sensitive information had been deleted and also to use summaries in place of the actual documents.

The bill as reported does not present any problem of discovery. Under the intent standard, CIA documents on the 2,000 agents previously identified would not be discoverable because the agents' fate is entirely relevant to the accused's intent. Even if the dangers of pretrial discovery could somehow be circumvented, the danger of undue disclosure of its secrets at trial would probably cause the CIA to demand that the Justice Department abruptly terminate the prosecution either through a plea bargain generous enough to entice the defendant or by outright dismissal of all charges.

Senators supporting the amendment have also suggested that the reason-to-believe standard would avoid resorting to highly intrusive investigative techniques such as wiretapping and inquiring at trial into the accused's political opinions. The prediction that the intent standard would require such intrusions again underestimate the sophistication of juries. Private telephone conversations of the publishers of Covert Action Information Bulletin are hardly necessary. Their public statements—even perusal of the publications themselves—leaves no doubt whatever about their intent. In any event, the intrusiveness of investigation under either standard will depend primarily on the judgment and policies of Justice Department officials.

If the bill, as reported by the Judiciary Committee, in fact makes for better prosecutions, then why do the CIA and the Justice Department strongly prefer the Chafee version? Perhaps the appeal of the Chafee version is that it appears tougher. But in reality, criminal statutes derive their effectiveness from their capacity to deter future misconduct. Generally, deterrence comes not from statutes which look stern, but ones that are enforced. Those misguided persons who seek to expose our intelligence agents are the least likely to be dissuaded merely by enactment of a new law. What would deter them would be seeing someone go to prison for naming names. In similar fashion, the morale of our agents would be raised not by enactment of a tough looking statute but by enforcement of a realistic statute.

Deterrence, furthermore, only continues as long as convictions are sustained on appeal. If amended, the statute not only might by invalidated but its application in particular cases might be reversed. A jury's finding on intent normally cannot be overturned by an appellate court unless the record of the trial is entirely devoid of any evidence on which the jury could have based its determination. Reason to believe, however, is a standard that permits the courts to second-guess the jury and reverse its finding if the appellate judges disagree.

Supporters of the amendment take comfort from the fact that the phrase "reason to believe" appears in a handful of criminal statutes, including the Espionage Act, that have been upheld by the courts. Three crucial distinctions have been overlooked in this regard. First, these statutes focused on surreptitious transfers of secret information, while S. 391 concerns public disclosures. Second, no appellate case has been found affirming a conviction based only on reason to believe. In most of the statutes the prosecution may prove either intent or reason to believe. Review of the cases suggests that the evidence proved intent. Third, the reason to believe standard is used very differently in these statutes than in S. 391. Typically, the defendant must have the normal criminal intent when he passes the secret information. Reason to believe comes in on the issue of what the receiver will do with the information. If the defendant has reason to believe the foreign power will use it against the United States, he is guilty. Thus, reason to believe has been used to describe the defendant's state of mind as to what third parties may do, not, as in this amendment, as to what he himself is doing.

In short, my review of the Intelligence Identities Protection Act has led to the firm conclusion that, as reported by the Judiciary Committee, it would provide: Better protection for agents' identities because it is more prosecutable; better protection of fundamental fairness because, like comparable felony statutes, it requires criminal intent; and better protection of freedom of the press because it removes the threat of possible prosecution.

ORDER OF PROCEDURE

Mr. SPECTER. Mr. President, I thank the distinguished Senator from West Virginia. I yield the floor.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. ROBERT C. BYRD. Mr. President, how much time does the distinguished Senator from Pennsylvania have remaining under his order?

The PRESIDING OFFICER. He has 8 minutes remaining.

Mr. ROBERT C. BYRD. I ask unanimous consent that I may have control of that time, also.

The PRESIDING OFFICER. Without objection, it is so ordered.

ROUTINE MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, there will now be a period for the transaction of routine morning business.

ANTI-SEMITIC INCIDENTS UP FOR THE THIRD YEAR

Mr. SASSER. Mr. President, I would like to share with my colleagues an article which appeared in the Anti-Defamation League of B'nai B'rith's February bulletin.

One would have hoped that after the disturbances of the past few years in this country the voices of hate would have been stilled. This is obviously not the case. The report clearly shows that there are still those in our society who would deny to some of our citizens that basic right which is one of the foundations of our country—freedom of religious practice.

According to the League's report, the number of anti-Semitic incidents doubled between 1980 and 1981—from 377 to 974. The report also reviews the measures which have been taken by various States to punish those who would tamper with our liberties.

Last year, here in the Senate, I introduced legislation which would make it a Federal crime to damage any cemetery or a building used for religious purposes (S. 966). The League's report points up the need for legislation to enable the full resources of law enforcement to be brought to bear on those who would violate one of our citizens' most fundamental rights.

I ask my colleagues to join with myself, and Senators SIMPSON, SARBANES, BOSCHWITZ, and METZENBAUM who are cosponsors of this measure in working for its early passage.

Mr. President, I ask unanimous consent that the article from the Anti-Defamation League's bulletin be printed in the RECORD in full.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the ADL Bulletin, Feb. 1982]

ANTI-SEMITIC INCIDENTS UP FOR THE THIRD YEAR

The number of reported anti-Semitic incidents in 1981 was more than double 1980,